IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1738

NATHANIEL SCHLESINGER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND APPENDIX

HAROLD R. TYLER, JR.
Patterson, Belknap, Webb & Tyler
30 Rockefeller Plaza
New York, New York 10020
(212) 541-4000
Counsel for Petitioner

May 19, 1979.

INDEX

CITATIONS

Cases:

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Nathaniel Schlesinger respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 19, 1979.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix. The opinion of the District Court for the Eastern District of New York denying petitioner's post-trial motion to dismiss the indictment is reported as *United States* v. *Schlesinger*, 457 F. Supp. 812 (1978).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on April 19, 1979. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether an indictment based solely upon the prosecutor's unsworn summary of testimony given before a prior grand jury violates the Fifth Amendment?

2. Whether the entrapment defense is precluded when a government agent induces a crime for his own corrupt purposes?

Constitutional Provision Involved

United States Constitution, Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .

Statement of the Case

The events that led to the grand jury proceedings and the trial which are the subject of this appeal began with the arrest on November 1, 1977 of Eliezer Weiss, a young Israeli who could neither read nor write English, for failing to declare diamonds when entering the United States. (Tr. 197-199, 202-205, 207, 301; DX C and DX D).*

* "Tr." refers to the trial transcript; "May 8 Tr." refers to the transcript of the proceedings that occurred on May 8, 1978, which was separately numbered; "G.J. Tr." refers to the transcript of proceedings before the grand jury on May 8, 1978; "GX" refers to Government Exhibits at trial; "DX" to Defense Exhibits.

I. The Indictments

On December 9, 1977, Weiss was indicted by a grand jury in the Eastern District of New York and charged with smuggling diamonds into the United States. Weiss pleaded not guilty. To support his argument that he did not knowingly violate the law, Weiss, through his attorneys, agreed to submit to a polygraph examination with the understanding that the results of the test would be considered by the United States Attorney in determining whether to prosecute. (Tr. 6-7). A polygraph examiner was selected by the United States Attorney's Office. (Tr. 7, 342). At the behest of mutual friends, the petitioner Schlesinger agreed to help Weiss, since Weiss was a stranger in this country. On December 29, 1977, Weiss and Schlesinger went to the polygraph examiner's office, where Weiss submitted to the examination. (Tr. 30). According to the government's version at trial Schlesinger bribed the polygraph examiner to report that Weiss had passed the test.

On January 24, 1978, a grand jury returned a three-count indictment (78 Cr. 40) against Weiss and Schlesinger, charging that they had conspired to induce, and did induce, the polygraph examiner to submit a false report to the United States Attorney. Count one charged conspiracy, count two obstruction of justice by means of bribery, and count three acting as accessory after the fact. On January 26, 1978, Schlesinger pleaded not guilty to that indictment.

On May 8, 1978, the first day of trial, the Assistant United States Attorney who was to try the case asked the trial court to dismiss the first and third counts, charging conspiracy and acting as an accessory after the fact, to permit the prosecution to proceed against Schlesinger alone on the second count, charging obstruction of justice. (May 8 Tr. 10). The second count, however, also named

Weiss as a co-defendant, and alleged and incorporated by reference all of the conspiracy count, which in effect also made the second count a conspiracy count. The court pointed this out to the Assistant United States Attorney, who argued that the incorporating language was mere surplusage and should be ignored. (May 8 Tr. 11, 15, 16, 20). Schlesinger's attorney objected to the prosecutor's eleventh-hour proposal to amend on his own the indictment voted by a grand jury. (May 8 Tr. 16-21).

The prosecution then suggested that it would draft a one-count superseding indictment charging Schlesinger alone with obstruction of justice and omitting any reference either to the alleged conspiracy or to the defendant Weiss. The court then recessed until 2:00 o'clock in order to permit the prosecutor to obtain a superseding indictment. (May 8 Tr. 27).

Another prosecutor, not the government trial counsel, appeared before the grand jury. He marked the original indictment as an exhibit, and summarized its contents. (G.J. Tr. 2-3). After informing the grand jurors that the government wished to proceed against Schlesinger alone, and only on the obstruction of justice charge, counsel requested the return of a superseding indictment. (G.J. Tr. 3-4). Stating that he "[had] copies of the Grand Jury testimony before [the] earlier grand jury," (G.J. Tr. 4) he then in his own words briefly summarized the prior testimony of the three witnesses who appeared before the original grand jury. (G.J. Tr. 4-5). He did not read any of this prior testimony, and the following colloquy took place:

> "MR. FRIED: If the Grand Jury desires, I can read these three transcripts to you. If you don't wish to have that, I would like you to vote on the indictment which is the superceding [sic] indictment, as I indicated.

> Is it necessary to read the Grand Jury testimony at this time to the Grand Jury?
>
> THE FOREMAN: Do you need any testimony from the Grand Jury?
>
> I don't think so.
>
> MR. FRIED: Thank you." (G.J. Tr. 5).

A recess was taken after which the grand jury voted the superseding indictment. (G.J. Tr. 5). It was only after the vote of the superseding indictment that the prosecutor realized that he had "forgot[ten] to mark these last three exhibits [the transcripts]." (G.J. Tr. 5-6). While the transcripts were being marked as exhibits, the prosecutor stated:

> "MR. FRIED: Incidentally, Mr. Abbatiello [a Bureau of Customs Agent who worked on the case] is outside, if anybody would like to talk to him.
>
> I understand his presence is not required.
>
> THE FOREMAN: We don't need him." (G. J. Tr. 6).

The superseding indictment was then handed up to a Magistrate.

The trial court did not review the transcript of the grand jury presentation of the superseding indictment until after the government concluded its case. At that time, the court questioned the prosecutor, without placing him under oath or affording an opportunity for cross-examination, as to the total failure to present any evidence to the grand jury. The prosecutor admitted that the transcripts of the prior testimony had not been read to the grand jury and the court concluded that the tran-

scripts had also not been read by the grand jurors. (Tr. 250-257). The trial court then observed: "I don't see that this Grand Jury had sufficient [evidence]." (Tr. 258). The court asked the prosecutor if he had at least left the transcripts with the grand jury. At first the prosecutor said he could not recall whether he left the transcripts. Pressed by the trial court, he then said his recollection was that he had left them before the grand jury, but he was not certain. Finally, he recalled leaving the transcripts in the grand jury room, but again was not sure when and if he picked them up. Despite the prosecutor's admitted confusion as to whether the transcripts were left with the grand jury, the court, without any basis, concluded that "[t]here is no question in my mind that . . . [the transcripts] . . . have been available to . . . [the grand jurors]." (G.J. Tr. 261-263).

The trial court, in its opinion denying the petitioner's post-trial motion, once again found as a fact that the transcripts were left with the grand jury. *United States* v. *Schlesinger*, *supra*, 457 F. Supp. at 813. However, no hearing was ever granted on this issue. The prosecutor has never testified under oath to these facts. He has never been cross-examined; nor has the defendant been permitted to call any other witnesses.

II. The Trial

The trial involved in actuality only one issue—entrapment. The defense conceded the payment of $10,000 to Jessiah Jacobson, the polygraph examiner. Schlesinger testified, however, that the payment was induced by Jacobson's refusal, after Weiss apparently failed an initial polygraph test, to give a second and presumably fairer test, unless Jacobson first received payment either in jewelry or money. Jacobson testified, on the other hand, that it was Schlesinger who first suggested, and insisted upon, paying him money to induce him to submit a false

report to the United States Attorney's Office on the results of the polygraph examination.

The trial court instructed the jury that it had to determine whether Jacobson was a government agent before it could even consider the entrapment defense. (Tr. 522). However, there was no real dispute as to Jacobson's status as a government agent. The government's own case established that Jacobson was chosen as the polygraph examiner by the United States Attorney's Office.

Indeed, the government's theory in this case foreclosed any issue of Jacobson's status as a government agent. Under the agreement between the government and the polygraph examiner, Jacobson had the duty to report to the government. The indictment charged that Schlesinger endeavored "by means of bribery to obstruct, delay and prevent the communication of information [*i.e.*, the report] to the . . . the United States Attorney . . . by the polygraph examiner . . . ." Thus, on the government's theory of the case, Jacobson was the target of a bribe in his capacity as a reporting agent of the government. Accordingly, if Jacobson induced the obstruction, *i.e.*, the bribe, then the defense of entrapment must be available.

The jury was told to determine the issue of whether or not Jacobson was a government agent as follows:

> "Bear in mind, if the initiator of the criminal activity is not a Government agent, the defense of entrapment does not lie. You can't be entrapped by a private person. The entrapment must be done by a Government official or somebody acting under his orders and direction.
>
> Accordingly, if you find that Mr. Jacobson was not acting as a Government agent at the time the illegal activity was initiated there can be no defense of entrapment." (Tr. 522).

The trial court then instructed the jury:

> "Bear also in mind that part of the defendant's contention here, at least as the Court understands it, and it is up to you as to what the facts are, is that Mr. Jacobson *was acting as an extorter*, at least in the initial part of the proceedings, and again it is up to you, *which may be inconsistent with the theory that he was acting as a Government agent.*" * (Tr. 522) (emphasis added)

Later in its instructions, the trial court compounded the confusion it had already created, when it equated the concepts of extortion and entrapment. And, as if that were not confusing enough, the court then proceeded to compare extortion-entrapment with bribery. The trial court stated:

> "The defendant says, as I indicated, in addition to being entrapped and [sic] the $10,000 payment and the champagne bottles were in effect extorted from him by Mr. Jacobson. You must look at all the facts here to see whether such circumstances show such an *extortion or* whether they show a *bribery* as the Government contends.
>
> As [sic] for example, the conduct of Mr. Jacobson in reporting to the U.S. Attorney the proposed passing of money before it actually passed, consistent with the theory of *extortion or* consistent with that of *bribery.*" (Tr. 524) (emphasis added).

This instruction permitted the jury to convict the defendant upon finding either alternative, extortion or

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* Defense counsel preserved this issue for appeal by objecting to the trial court's charge after it was given, and before the jury retired for its deliberations. *See* Rule 30, Fed. R. Crim. P. (Tr. 536-537). Counsel again registered his objection when the court, in response to a request by the jury, re-read the entrapment charges. (Tr. 546-551).

bribery. The trial court had just finished instructing the jury that the existence of extortion might revoke any agency, thereby depriving the defendant of the entrapment defense. Then the court told the jury that it should examine the evidence to determine whether the evidence showed extortion (which, on the court's own prior instructions, would lead to conviction by revoking Jacobson's agency and with it the entrapment defense) or bribery (which would also lead to conviction, on the government's theory of the case). The jury returned a guilty verdict.

III. The Decision On Appeal

On appeal, the United States Court of Appeals for the Second Circuit held (i) that Schlesinger's challenge to the indictment was "foreclosed" by this Court's decision in *Costello v. United States*, 350 U.S. 359 (1956), and (ii) that on a view of the facts most favorable to Schlesinger, and assuming that the polygraph examiner was a government agent, Schlesinger was not entitled to a charge on entrapment, so that any errors in the charge were harmless.

Reasons for Granting the Writ

1. The Decision Below Conflicts with a Decision of Another Court of Appeals Concerning the Proper Interpretation of the Fifth Amendment's Grand Jury Clause.

The prosecutor in this case obtained a superseding indictment by simply marking the original indictment for identification, giving an unsworn summary of the original charges and the testimony before a different grand jury, and requesting a new indictment. No witnesses testified; no documents were marked for identification, much less read to or by the grand jury. No evidence of any kind was presented to support the indictment upon which Schlesinger was tried.

On these facts, the court below held that the resulting indictment met the requirements of the Fifth Amendment Grand Jury Clause. In so holding, it relied exclusively on the following language from this Court's decision in *Costello* v. *Untied States*, *supra*, 350 U.S. at 363:

> "An indictment returned by a legally constituted grand jury, if valid on its face, is enough to call for a trial on the merits. The Fifth Amendment requires nothing more."

The Court of Appeals concluded that the *Costello* decision foreclosed the argument presented here.*

The decision of the Court of Appeals in this case is in direct conflict with an earlier decision of the Court of Appeals for the Fifth Circuit. In *United States* v. *Hodge*, 496 F.2d 87 (5th Cir. 1974), the defendant challenged the constitutionality of a superseding indictment on the ground that no witnesses testified before the second grand jury, that the prosecutor simply explained to that grand jury a technical problem with respect to the first indictment and "related in summary unsworn hearsay form, the testimony before the first grand jury." 496 F.2d at 88. The Fifth Circuit held:

> "An indictment may rest upon hearsay [citing *Costello* v. *United States*, *supra*, 350 U.S. 359] and we see no problem if government agents did in fact give sworn testimony before the second grand jury as to what they and other witnesses had stated to the first grand jury. *But informal unsworn hearsay from the mouth of the prosecutor only is something else altogether. This, we think, is interdicted by the Fifth Amendment.* [citations omitted]." 496 F.2d at 88 (emphasis added).

The court below, recognizing that *Hodge* was indistinguishable from the facts of this case,* refused to follow the Fifth Circuit's decision. Rather, it asserted that *Hodge* was "inconsistent with *Costello* and [*United States* v.] *Calandra* [, 414 U.S. 338 (1974)]." Appendix at 8a n.1. The *Hodge* court, of course, distinguished *Costello*, and held that an indictment based on nothing more than unsworn hearsay is a nullity and, in essence, invalid on its face. *Cf. Costello* v. *United States*, *supra*, 350 U.S. at 364-65 (Burton, J., concurring); *United States* v. *Costello*, 221 F.2d 668, 677 (2d Cir. 1955), *aff'd*, 350 U.S. 359 (1956).

The irreconcilable conflict between the decisions of two Courts of Appeals on a constitutional question of considerable significance in the administration of criminal justice justifies the grant of certiorari to review the judgment below.

2. The Decision on the Grand Jury Issue Raises A Substantial and Important Question of Constitutional Law.

The Court of Appeals decision in this case is a major pronouncement concerning the minimum requirements of

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* As the Second Circuit itself has noted, however, this language is dictum. *United States* v. *Hinton*, 543 F.2d 1002, 1008 n.7 (2d Cir.), *cert. denied sub nom. Carter* v. *United States*, 429 U.S. 980 (1976). Furthermore, the quoted language simply cannot be understood as the Second Circuit appears to have read it, that is, as precluding *any* attack on grand jury proceedings. No one could argue, for example, that an indictment based upon knowing use of perjured testimony or upon a vote corruptly induced by a prosecutor was consistent with the Fifth Amendment guarantee. Yet the Court of Appeals' unrestrained reliance upon the *Costello* dictum would logically lead to precisely such a result.

* The Court of Appeals suggested that "*Hodge* may be distinguishable since in the present case the grand jury was expressly given the opportunity to inspect transcripts of the witnesses' testimony. . . ." The record reveals, however, that the grand jurors did not avail themselves of this opportunity, and the Court of Appeals did not conclude that *Hodge* was indeed distinguishable on this ground.

the Grand Jury Clause of the Fifth Amendment. Since the precise question presented—that is, whether *any* evidence need be placed before a grand jury before it votes an indictment—has never been addressed by this Court, the Court should review the judgment to provide long-needed guidance on the meaning and scope of the Grand Jury Clause.

The requirement that defendants be brought to trial for serious crimes only upon an indictment by a grand jury long antedates the Constitution. *Ex parte Bain*, 121 U.S. 1, 12 (1887); *Costello* v. *United States*, *supra*, 350 U.S. at 362. The grand jury serves the irreplaceable function of protecting citizens against unfounded complaints of criminal wrongdoing, and of examining and weighing evidence presented by the prosecutor to assure that no person's liberty will be placed in jeopardy upon mere rumor or the malice of the prosecutor. *Wood* v. *Georgia*, 370 U.S. 375, 390 & n.17 (1962); *Hoffman* v. *United States*, 341 U.S. 479, 485 (1951). *See generally Branzburg* v. *Hayes*, 408 U.S. 665, 686-87 (1972); *United States* v. *Calandra*, *supra*, 414 U.S. at 343-44. This Court has emphasized that "[t]he very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone* v. *United States*, 361 U.S. 212, 218 (1960).

In this case, the Court of Appeals ruled that a defendant is properly brought to trial when the grand jury had before it no evidence at all, and merely indicted upon the unsworn statement of the prosecutor. If this ruling is allowed to stand, it will empower prosecuting attorneys to obtain indictments essentially at their own request, removing any assurance that the grand jury is fulfilling its function of standing between the government and the accused. The decision is thus radically

inconsistent with the decisions of this Court, which have uniformly reaffirmed the "high place [the grand jury] held as an instrument of justice." *Costello* v. *United States*, *supra*, 350 U.S. at 362.

The Court of Appeals concluded that petitioner's argument is "foreclosed by *Costello* v. *United States*. . . ." Appendix at 8a. In *Costello*, however, this Court ruled only that an indictment based upon hearsay evidence was legally sufficient. 350 U.S. at 363. There is simply no suggestion in *Costello* or its progency, *see*, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339 (1958); *United States* v. *Blue*, 384 U.S. 251 (1966), that the evidence before the grand jury may consist solely of unsworn statements of the prosecutor himself. The essential issue in this case is not whether the evidence before the grand jury was "adequate" or "sufficient" as those terms are used in *Costello;* rather, the issue is whether a rule allowing a prosecutor to procure an indictment merely by telling a grand jury that there is evidence is consistent with the role of the grand jury as a necessary buffer between the prosecutor and the accused. This issue strikes at the core of the Fifth Amendment requirement that a grand jury—and not simply the prosecutor—assess the evidence against an accused before he is brought to trial. Particularly since this Court has never considered the question presented in this case, the Court should review the decision of the Court of Appeals for the Second Circuit.*

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* In its argument to the Second Circuit, the government contended that since a prior grand jury had voted an indictment upon properly presented evidence, any possible defect in the voting of the superseding indictment was of no significance to the petitioner. The superseding indictment, however, was not identical with the original one. It thus followed "that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney. . . ." *Ex parte Bain*, *supra*, 121 U.S. at 13.

3. The Decision Below on the Entrapment Issue Raises A Substantial and Important Question Concerning the Administration of Criminal Justice.

The court below held that the entrapment defense was not available to the petitioner since on a view of the facts most favorable to him, the government agent "sought the [bribe] for his own corrupt purposes and not as evidence for the Government against Schlesinger." Appendix at 9a.* The danger and fallacy in this ruling is that it requires proof of the government agent's state of mind before a trial court can determine whether the entrapment defense is available. Such a rule will frustrate the policies underlying the entrapment defense, and will radically alter the substance and the availability of the defense in federal courts.

If the ruling of the Court of Appeals is allowed to stand, the entrapment defense would be available against the over-zealous agent but unavailable against a truly corrupt agent, a situation in which, as a matter of policy, the defense should be most readily available. The prior decisions of this Court strike a balance between the government and the citizen: Once there is some evidence of inducement, the government is put to its proof to demon-

* *United States* v. *Kabot*, 295 F.2d 848 (2d Cir. 1961), *cert. denied*, 396 U.S. 803 (1962), relied on by the Court of Appeals, does not support the court's holding. *Kabot* stands for two principles: (1) that extortion alone is no defense to bribery; and (2) that when a government agent's alleged "attempt at extortion" does not "incite [the defendant] to crime," there can be no entrapment defense since there is no traditional inducement. 295 F.2d at 854. *Kabot* suggests strongly that when a government law enforcement agent attempts extortion that does incite a defendant to crime, the entrapment defense is available. *Kabot* does not in any way bar the entrapment defense if the government agent's inducement is originally motivated by his own corrupt purposes.

strate that its agent did not manufacture the crime. *Lopez* v. *United States*, 373 U.S. 427, 434 (1963). The entrapment defense implements a policy against government-manufactured crime that applies at least as strongly in the case of the truly venal agent, as in the case of the over-zealous agent.

The rule established in the court below will create in entrapment cases a threshold jury question concerning the government agent's motivation. If the government agent induces in order to prosecute, the entrapment defense is available. If, however, he induces for some other purpose, the defense is not available. Certainly this Court has established no such threshold question, having focused on the traditional twin elements of inducement and lack of predisposition. *Sherman* v. *United States*, 356 U.S. 369, 372-75 (1958). This Court, moreover, has made it clear that the defense is available whenever there is evidence of inducement. It should not be necessary for there also to be evidence of the government agent's motivation. The citizen induced by a government agent to commit a crime cannot know the true intent of the agent, nor is he in a position at trial to prove the negative respecting the agent's lack of evil motive. Moreover, even if such proof were available to a defendant, the rule established below would deprive a defendant of the entrapment defense if a government agent induced with a venal motive, but later abandoned his plan, out of fear of detection or otherwise, and pursued the prosecution of the defendant he entrapped.

The court below relied on no holding of this Court in reaching its result. To the extent that the result can be rationalized by any pronouncement of this Court, it is the dictum in *Sorrells* v. *United States*, 287 U.S. 435 (1932), condemning the situation "presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent

person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." 287 U.S. at 442. Yet a standard that turns on the subjective motivations of government agents at the moment they induce criminal behavior is unresponsive to the articulated policies of *Sorrells* and *Sherman*, unworkable, and therefore unfair to the citizens who are supposed to be protected against government overreaching by the entrapment defense. Review by this Court is necessary to prevent such a standard from undermining the entrapment defense.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

HAROLD R. TYLER, JR.
Patterson, Belknap, Webb & Tyler
30 Rockefeller Plaza
New York, New York 10020
(212) 541-4000
Counsel for Petitioner

May 19, 1979

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 569—August Term, 1978.

(Argued January 23, 1979 Decided April 19, 1979.)

Docket No. 78-1375

UNITED STATES OF AMERICA,

Appellee,

—against—

NATHANIEL SCHLESINGER,

Appellant.

Before:

LUMBARD, FEINBERG and MESKILL,

Circuit Judges.

Defendant appeals from conviction for obstruction of justice on grounds that indictment was based on inadequate evidence and that trial judge's charge to jury was prejudicial. Affirmed.

EDWARD R. KORMAN, United States Attorney for the Eastern District of New York (Douglas K. Mansfield, Assistant United States Attorney, of Counsel), *for Appellee.*

HAROLD R. TYLER, JR., Esq., New York, N.Y. (Patterson, Belknap, Webb & Tyler, New York, N.Y., Rudolph W. Giuliani, Michael B. Mukasey, and Kenneth A. Caruso, of Counsel), *for Appellant.*

LUMBARD, *Circuit Judge:*

Schlesinger appeals from his conviction for obstruction of justice after a jury trial before Judge Platt in the Eastern District of New York. Finding no merit in Schlesinger's claims that his indictment was based on inadequate evidence and that he was prejudiced by the trial judge's charge to the jury, we affirm the conviction.

Schlesinger's indictment and conviction grew out of the arrest of one Eliezer Veiss for smuggling in November of 1977. Veiss, an Israeli citizen, was arrested upon arriving at Kennedy Airport from Israel after a search by customs officials disclosed that he was carrying a large quantity of diamonds. Though Veiss did not speak English, he had represented both orally through an interpreter and in a written statement to customs official that he was not carrying property that required declaration.

Schlesinger's connection with Veiss apparently developed after certain members of the Hasidic community in Williamsburg requested that he help Veiss defend himself against the smuggling charge. Schlesinger agreed and as a first step arranged for Veiss to be represented by attorneys Milton Gould and Thomas Andrews.

In December of 1977, Gould and Andrews met with David Trager, then the United States Attorney for the Eastern District and two of his assistants, Bernard Fried and Shira Scheindlin. It was agreed at the meeting that Veiss would submit to a polygraph examination so as to determine his state of mind at the time he attempted to enter the United States with the diamonds. The polygraph test was to be administered by an examiner agreeable to both sides and it was also agreed that its results were not to be admissible in court but were simply to aid the Government in deciding whether to prosecute Veiss.

In its search for a suitable examiner, the Government contacted James Keefe, whose firm Truth Verification, Inc., had previously done work for the United States Attorney's office. Keefe in turn recommended his copartner Jessiah Jacobson who, with the assistance of his brother Hirsch, could administer an exam in both Yiddish and Hebrew.

Jacobson proved acceptable to both sides and the examination was scheduled for the morning of December 29, 1977 in Jacobson's office at Truth Verification, Inc. What occurred at the examination and immediately thereafter was hotly contested at trial. According to the testimony of the Government's witnesses Veiss was given the exam twice, first in Yiddish and then in Hebrew. Convinced by the end of the test that Veiss' answers were dishonest, Jessiah Jacobson went into Keefe's office and telephoned his conclusions to Special Agent Frederick Abbatiello, the customs officer assigned to Veiss' case. After returning to his own office, Jacobson, along with his brother Hirsch, explained to Veiss that he had failed the test.

While the Jacobsons were speaking to Veiss they noticed a man's shadow on the door, his ear pressed to the glass. The man was Schlesinger and, with Veiss' permission, the Jacobsons brought him into the room. Schlesinger introduced himself and explained that he was a go-between for persons of the Hasidic community having dealings with government agencies. He argued that Veiss could not have intended to smuggle the diamonds since the duty on their invoice value of $19,000 would only have been about $500. When Jessiah Jacobson suggested that the value of the diamonds was in fact much higher than $19,000, Schlesinger offered to place a call to his brother-in-law who was in the diamond business. The call only confirmed Jacobson's opinion, however, since Schlesinger's brother-in-law indicated that one of the diamonds alone was worth $25,000.

Failing in his attempt to persuade Jacobson that Veiss was telling the truth, Schlesinger nevertheless urged him to report to the United States Attorney's office that Veiss had passed the test. When Jacobson rejected Schlesinger's suggestion that he submit the false report for the sake of the Jewish community, Schlesinger switched to more tangible inducements, offering first to let Jacobson purchase the diamonds at the invoice price of $19,000, and later to pay Jacobson $25,000 for a favorable report. Though Jacobson declined both offers, Schlesinger continued to urge that he falsify his report. Finally, and only because he had another appointment to go to and needed to get Schlesinger out of his office, Jacobson stated that he would think about Schlesinger's offers and that Schlesinger should come back later that afternoon.

When Schlesinger and Veiss departed, the Jacobsons went to Keefe's office and reported to him the details of Schlesinger's proposals. Jessiah Jacobson then called the United States Attorney's office but was told that Assistants Fried and Scheindlin were out to lunch. Before leaving he asked Keefe to continue calling that afternoon. Though Keefe placed a number of calls, he also was unable to reach either Fried or Scheindlin.

Jessiah Jacobson returned to his office at about 5:00 P.M. and found Schlesinger and Veiss waiting for him. Schlesinger promptly resumed his earlier attempts to persuade Jacobson to submit a favorable report, this time indicating that Jacobson could get $10,000 right away at Schlesinger's office. Jacobson thereupon excused himself, went into Keefe's office and placed a call to the United States Attorney's office. He advised Fried of Schlesinger's offer to pay $10,000 for a favorable report. Fried asked Jacobson if he would be willing to cooperate with the Government, and when Jacobson said that he would, Fried instructed him to go along with Schlesinger and pretend to accept the offer. Fried then arranged for customs agents to set up surveillance around Schlesinger's place of business at 50 Wallabout Street.

When Jacobson returned to his office he told Schlesinger, in accordance with Fried's instructions, that he would accept the $10,000. Schlesinger, Jacobson, Keefe and Veiss then went to Schlesinger's car and drove to 50 Wallabout Street. Inside, they went to Schlesinger's personal office where Schlesinger took $10,000 out of his safe and gave it to Jacobson. After Jacobson and Keefe had a brief tour of the premises, Schlesinger drove them back to their offices. Once there Jacobson called Fried who directed customs agents to pick up the bribe money.

Schlesinger's version of the events surrounding Veiss' polygraph exam contrasts sharply with the Government's. According to his testimony, Schlesinger accompanied Veiss to the offices of Trust Verification, Inc. on the day of the polygraph exam. Remaining outside in a waiting area while Veiss entered the room in which the exam was to be given, Schlesinger after a few minutes heard Jessiah and Hirsch Jacobson shouting at Veiss in "Jewish," telling him that smuggling was "a very big sin" and a "disgrace" and that Veiss would "rot in jail." Despite this abuse, Schlesinger waited outside the exam room for almost an hour until the test was over. When Jessiah Jacobson finally emerged from the exam room he informed Schlesinger that he didn't believe Veiss was telling the truth. Schlesinger responded that Veiss must have been upset by what he had been put through and he asked Jacobson to conduct a second test once Veiss had calmed down. Jacobson allegedly replied that he "didn't do anything unless he got paid for it," but might perform another test if he were allowed to purchase the diamonds for $19,000. Though Schlesinger denied having any authority to sell Jacobson the diamonds, Jacobson nevertheless suggested that he come back at 3 o'clock and he would see what he could do about conducting a second test.

According to Schlesinger, when he returned to Jacobson's office later that afternoon, Jacobson stated that he would make the test if Schlesinger paid him $10,000.

Schlesinger reluctantly agreed, and because of Jacobson's insistence that he be paid right away, drove with him to his office at 50 Wallabout and turned over the money. Schlesinger testified further, that despite his request that another test be made, Jacobson stated that it was unnecessary because "I have to make up the reports, whatever I put in the report that is what counts."

In contending that his conviction must be overturned, Schlesinger acknowledges, as he must, that the jury was entitled to reject his explanation for the $10,000 payment and to credit the testimony of the Government's witnesses. Though Schlesinger also concedes that there was more than enough evidence to support his conviction, his first argument on appeal is that the evidence underlying his indictment was inadequate and that its dismissal is required either by virtue of the Grand Jury Clause of the Fifth Amendment or as an exercise of this court's supervisory powers over the administration of justice.

Schlesinger was initially charged in a three count indictment which also named Eliezer Veiss. Count one of this indictment contained a long and detailed narrative of the evidence and charged Veiss and Schlesinger with conspiracy to defraud the United States. Count two of the indictment repeated the allegations of count one and then charged the defendants with obstruction of justice. The third count charged Schlesinger with being an accessory after the fact to the smuggling offense on which Veiss had initally been charged.

On April 26, 1978, some months after the indictment against Schlesinger and Veiss was returned, the Government, because of its doubts as to the competency of Veiss to stand trial, moved to sever his trial from that of Schlesinger. On the morning of May 8, 1978, the date scheduled for Schlesinger's trial, the Government moved to dismiss counts one and three of the indictment and

proceed against Schlesinger solely on the obstruction of justice charge in count two. The trial judge granted the motion to dismiss and indicated, moreover, that because he considered the first paragraph of count two, which simply repeated the allegations of count one, to be mere surplusage, he would not read it to the jury.

Schlesinger's counsel objected to the trial judge's proposed editing of count one, arguing that it had to be presented to the jury in the same form in which the grand jury had voted on it. In response, the trial judge indicated that he would read to the jury all of count two, but would instruct it that the conspiracy alleged in the first paragraph "is not involved. It's just a matter of descriptive material." Schlesinger's counsel, however, objected to this proposal as well and the Assistant United States Attorney who was to try the case, also expressing concern over the procedure to be followed, suggested the possibility of a superseding indictment. The trial judge approved and gave the Government until 2:00 P.M. to produce a superseding indictment.

Since the grand jury that had voted the original indictment against Schlesinger had been dismissed, the superseding indictment was presented to a grand jury unfamiliar with the case. Assistant United States Attorney Fried, who had obtained the original indictment against Schlesinger, recounted to the grand jury the allegations of that indictment and explained that a superseding indictment was needed to omit the surplus language in count two. After indicating that he had the transcripts of the testimony of the witnesses before the earlier grand jury, Fried summarized that testimony and then offered to have the transcripts read to the grand jury. The grand jury foreman declined this invitation, however, and after Fried had left the room, the grand jury voted the superseding indictment.

Schlesinger's argument that his superseding indictment violated the Grand Jury Clause of the Fifth Amend-

ment is foreclosed by *Costello* v. *United States*, 350 U.S. 359, 363 (1959) where the Court stated that:

> "An indictment returned by a legally constituted grand jury, if valid on its face, is enough to call for a trial on the merits. The Fifth Amendment requires nothing more."

The broad language of *Costello* was reaffirmed in *United States* v. *Calandra*, 414 U.S. 338, 345 (1974), and has been reflected in numerous decisions of this court. *See, e.g., United States* v. *Mangan*, 575 F.2d 32 (1978); *United States* v. *Marchand*, 564 F.2d 983, *cert. denied*, 434 U.S. 1015 (1978); *United States* v. *Bertolotti*, 529 F.2d 149 (1975); *United States* v. *Ramsey*, 315 F.2d 199 (1963). Though it is true that Fried's summary to the grand jury of prior grand jury testimony was at best hearsay, the indictment was unquestionably valid on its face, and thus the Fifth Amendment does not require that we look behind it to consider the character of the evidence upon which it is based.[1]

Schlesinger also argues, however, that this court must dismiss his indictment as an exercise of it supervisory powers over the administration of justice. In *United States* v. *Estepa*, 471 F.2d 1132 (1972), we held that an indictment must be dismissed pursuant to the court's supervisory powers where there is a high probability that the grand jury would not have indicted if presented with first-hand testimony rather than harsay or where the prosecution has misled the grand jury as to the "shoddy

[1] As support for his Fifth Amendment argument, Schlesinger points to *United States* v. *Hodge*, 496 F.2d 87 (5th Cir. 1974), where a panel of the Fifth Circuit held that a prosecutor's unsworn summary of testimony before an earlier grand jury could not support a superseding indictment. While we note that *Hodge* may be distinguishable since in the present case the grand jury was expressly given the opportunity to inspect transcripts of the witnesses' testimony, we believe that the decision is in any event inconsistent with *Costello* and *Calandra*.

merchandise they are getting." Neither of the conditions laid down in *Estepa* is met in this case, however. There is not the slightest doubt that the grand jury would have voted the superseding indictment if it had had, not a summary of their testimony, but the witnesses themselves before it. Nor is there any question but that the grand jurors were aware of the nature of the evidence before them and, indeed, were told explicitly that they could "seek something better if they wish." *Estepa* at 1137. In short, this case presents no occasion for the court to invoke its supervisory powers and order an indictment dismissed. The concededly unorthodox procedure used to obtain the superseding indictment, although generally inappropriate, was to some extent forced upon the Government by exigent circumstances and the persistence of appellant's trial counsel, and, in any event, did not result in the slightest prejudice to Schlesinger.

Schlesinger also raises a number of objections to the trial court's charge to the jury. The first two relate to the defense of entrapment, raised by Schlesinger at trial and based on his contention that his $10,000 payment to Jessiah Jacobson was instigated by Jacobson. Schlesinger challenges the trial court's failure to instruct the jury that Jacobson was, as a matter of law, an agent for the government, and also the trial court's instruction as to the inducement required to constitute entrapment.

The short answer to Schlesinger's complaints regarding the court's charge on entrapment is that the defense of entrapment was not available to him. Viewing the facts in the light most favorable to Schlesinger, and thus accepting that Jacobson was an agent of the government and solicited the payment from Schlesinger, there is still no basis for an argument that Schlesinger was entrapped. According to Schlesinger, Jacobson sought the $10,000 payment for his own corrupt purposes and not as evidence for the Government against Schlesinger. Such a claim of extortion precludes the defense of entrapment. As we

stated in *Unitd States* v. *Kabot*, 295 F.2d 848, 854 (1961):

> Entrapment involves the action of overzealous government agents acting for the government inciting an innocent man to crime. Extortion on the other hand is based on conduct by dishonest employees attempting action against the government.

Schlesinger's final argument is that the trial judge failed to balance his charge that a defendant's interest in the case may affect his credibility as a witness with an instruction that the defendant's interest is not inconsistent with the ability to tell the truth. As Schlesinger points out, we have held that it is preferable for the trial judge to include a balancing instruction where the charge suggests that a defendant's credibility may be affected by his vital interest in the case. *United States* v. *Rucker*, 586 F.2d 899 (1978); *United States* v. *Floyd*, 555 F.2d 45, *cert. denied*, 434 U.S. 851 (1977). While we do not retreat from that view in this case, and, indeed, question the need for any instruction as to the effect the defendant's interest may have on his credibility, we do not believe that the trial judge's failure to include the balancing instruction was, in the present circumstances, reversible error. We note firstly, that the trial judge's charge did contain some balancing language, instructing the jury that "a defendant's testimony is to be judged in the same way as any other witness." In addition, Schlesinger raised only a general objection with respect to the charge on the credibility of a defendant's testimony, failing either to identify specifically the basis for his objection or to suggest an appropriate alternative instruction. *See United States* v. *Vega*, 589 F.2d 1147 (2d Cir. 1978). The evidence against Schlesinger was overwhelming, and we find no basis for disturbing his conviction in the trial judge's failure to include a balancing instruction in the charge to the jury.

Affirmed.

Judgment

UNITED STATE COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of April, one thousand nine hundred and seventy-nine.

Present: HON. J. EDWARD LUMBARD
HON. WILFRED FEINBERG
HON. THOMAS J. MESKILL

Circuit Judges.

78-1375

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

ELIEZER WEISS, NATHANIEL SCHLESINGER,
Defendants,

NATHANIEL SCHLESINGSR,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

By: ARTHUR HELLER,
ARTHUR HELLER,
Deputy Clerk

No. 78-1738

In the Supreme Court of the United States

OCTOBER TERM, 1978

NATHANIEL SCHLESINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOSEPH S. DAVIES
CHRISTIAN R. VISSERS
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

Cases:

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1979. The petition for a writ of certiorari was filed on May 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction must be reversed because the superseding indictment was returned by a grand jury that heard only a brief summary of the testimony before the original grand jury.

2. Whether petitioner was entitled to an instruction on entrapment when he alleged only that a corrupt government agent solicited a bribe from him for the agent's personal gain.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of endeavoring to obstruct justice by means of bribery, in violation of 18 U.S.C. 1510. He was sentenced to 18 months' imprisonment. The court of appeals affirmed (Pet. App. 1a-10a).

1. In January 1978, a three-count indictment was returned against petitioner and Eliezer Veiss. The first count of the indictment, which contained a lengthy and detailed narrative of the evidence, charged Veiss and petitioner with conspiracy to defraud the United States (Pet. App. 6a). The second count repeated these allegations and charged both defendants with attempting to obstruct justice by employing bribery (*ibid.*). The third count charged that petitioner had been an accessory after the fact to the smuggling offenses for which Veiss had previously been indicted (*ibid*).

Due to doubts about Veiss's competency to stand trial, the government subsequently obtained a severance of his trial from that of petitioner (*ibid.*). On the day scheduled for commencement of petitioner's trial, the government moved to dismiss the first and third counts of the indictment and to proceed against petitioner only on the obstruction of justice offense alleged in the second count (Pet. App. 6a-7a). The trial judge granted the motion to dismiss counts one and three and indicated that he regarded the first paragraph of the remaining count—which reiterated the allegations of the conspiracy

charge—as surplusage that he would not read to the jury (Pet. App. 7a). Petitioner's counsel objected, insisting that the count should be read to the jury in its entirety. The district court then proposed to read all of the second count and then to instruct the jurors to disregard the "descriptive material" contained in the first paragraph, but defense counsel objected to this approach as well (*ibid.*). At this point government counsel suggested the possibility that a superseding indictment could be obtained. The trial judge approved this proposal and granted a brief recess to allow the government to seek a superseding indictment from the grand jury (*ibid.*)

During the recess, the government attorney who had obtained the original indictment presented it to a new grand jury,[1] explained the need for a superseding indictment omitting the surplus language in the obstruction of justice count, and summarized the testimony of the witnesses before the original grand jury. He offered to have the transcripts read and gave the grand jurors the opportunity to examine them (Pet. App. 7a, 8a n.1). The grand jury then declined the invitation to have the transcripts read aloud, and it voted the superseding indictment (Pet. App. 7a).

2. The trial on the superseding indictment began that afternoon. The government's evidence showed that in November 1977, Veiss, an Israeli citizen, was arrested as he attempted to enter the United States, when a search by customs officials disclosed that he was carrying a quantity of diamonds that had not been declared (Pet. App. 2a). Veiss was indicted for smuggling, and he agreed, through his attorneys, to submit to a polygraph examination

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[1]The grand jury that returned the original indictment had been dismissed.

regarding his state of mind at the time of his entry into the United States. It was agreed that the government would consider the results of the examination in deciding whether to proceed with prosecution of Veiss (*ibid.*). The test was to be administered by Jessiah Jacobson, a Yiddish and Hebrew-speaking polygraph operator who was associated with a firm that had previously done work for the United States Attorney's office; Jacobson was deemed acceptable by both parties. At the behest of mutual friends,petitioner agreed to help Veiss defend against the smuggling charges, and accordingly petitioner accompanied him to Jacobson's office for the polygraph examination (Pet. App. 2a-3a).

The accounts of prosecution and defense witnesses differed sharply over events occurring during the testing session and immediately thereafter. According to the testimony of government witnesses, Jacobson determined that Veiss's exculpatory responses to test questions indicated deception (Pet. App. 3a). Jacobson went into another room, telephoned his conclusions to a customs officer investigating the case, and then returned to advise Veiss of the outcome (*ibid.*). Petitioner joined them, introducing himself as a go-between for persons of the Hasidic community who had dealings with government agencies (*ibid.*). Jacobson testified that petitioner first attempted to convince him that Veiss had been truthful and, failing that, then suggested that for the sake of the Jewish community Jacobson should nevertheless inform the United States Attorney's office that Veiss had passed the test (Pet. App. 3a-4a). Jacobson stated that when he refused to do so, petitioner offered to sell Jacobson the diamonds for an extremely low price or, alternatively, to pay Jacobson $25,000 in return for a favorable report (Pet. App. 4a). Jacobson stated that, in the face of petitioner's persistence and in order to convince him to leave, he told petitioner he would consider the offers (*ibid.*).

According to Jacobson, petitioner and Veiss returned later the same day, and petitioner promptly resumed his earlier attempts to induce submission of a false report. When petitioner offered to pay Jacobson $10,000 immediately at his business office, Jacobson excused himself, advised the United States Attorney's office of the proposal, and agreed to cooperate with the government by pretending to accept the bribe (Pet. App. 4a). Petitioner, Veiss, and Jacobson then drove to petitioner's office, where petitioner gave Jacobson $10,000 in cash (Pet. App. 5a).

Petitioner's version of these events was considerably different. Petitioner testified that he accompanied Veiss to Jacobson's office, where he overheard Jacobson and his assistant verbally abusing Veiss at the outset of the examination for having committed a "very big sin" and a "disgrace" by smuggling diamonds (Pet. App. 5a). When Jacobson emerged and announced that Veiss had failed the examination, petitioner requested that a second examination be conducted because the examiners had subjected Veiss to considerable stress during the first examination (*ibid.*). According to petitioner, Jacobson responded that he would only consider readministering the test in return for permission to purchase the diamonds at a nominal price (*ibid.*). Petitioner denied that he had the authority to sell Jacobson the diamonds, but stated that later that afternoon he had reluctantly agreed to pay Jacobson $10,000 to conduct a second examination (Pet. App. 5a-6a). He explained that he had accompanied Jacobson to his office because the latter insisted on immediate payment (Pet. App. 6a).

3. On appeal petitioner contended that the court of appeals should exercise its supervisory power to dismiss the superseding indictment because it had been procured solely on the basis of the prosecutor's hearsay summary of

the testimony before the first grand jury. The court of appeals rejected this contention, finding that the second grand jury had been well aware of the nature of the evidence before it and that there was "not the slightest doubt that the grand jury would have voted the superseding indictment if it had had, not a summary of their testimony, but the witnesses themselves before it" (Pet. App. 9a). The court also rejected petitioner's contention that the entrapment instruction had been improper, concluding (*ibid.*) that even viewing the facts in the light most favorable to petitioner, the entrapment defense had not been available to him.

ARGUMENT

1. Petitioner contends (Pet. 9-13) that the superseding indictment violated the Fifth Amendment guarantee that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" because there was no evidence placed before the grand jury other than the prosecutor's unsworn summary of the original charges and testimony.

a. In *Costello* v. *United States*, 350 U.S. 359, 363 (1956), this Court squarely rejected the contention that the courts may review the sufficiency of evidence supporting an indictment:

> An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

More recently, in *United States* v. *Calandra*, 414 U.S. 338, 344-345 (1974), this Court reaffirmed *Costello*, holding that "the validity of an indictment is not affected

by the character of the evidence considered" and accordingly that a valid indictment is not subject to challenge "on the ground that the grand jury acted on the basis of inadequate or incompetent evidence," including illegally obtained evidence.

Since petitioner does not contend that the indictment in the instant case was facially invalid, the court of appeals properly concluded (Pet. App. 8a) that petitioner's claim did not require the court to look behind the indictment to determine whether it was based on sufficient evidence. See *United States* v. *Barone*, 584 F. 2d 118, 124 (6th Cir. 1978); *United States* v. *Mangan*, 575 F. 2d 32, 49 n.20 (2d Cir. 1978), cert. denied, No. 78-5004 (Oct. 30, 1978); *United States* v. *Brown*, 574 F. 2d 1274, 1275-1276 (5th Cir. 1978), cert. denied, No. 78-391 (Dec. 11, 1978); *United States* v. *Jett*, 491 F. 2d 1078, 1081-1082 (1st Cir. 1974).

In any event, the evidence relied upon by the grand jury that returned the superseding indictment was not insufficient. The prosecutor summarized the prior sworn testimony of three witnesses who had personal knowledge of the events, and he made the transcripts of the prior testimony available so that the grand jurors could test the accuracy of his summary. See *United States* v. *Bertolotti*, 529 F. 2d 149, 159 (2d Cir. 1975). The summary of the sworn testimony of witnesses with firsthand knowledge of the relevant events was more reliable than the testimonial evidence that was before the grand jury in *Costello*, which consisted of hearsay statements by three investigators, none of whom had any firsthand knowledge of the alleged transactions upon which they had based the computations supporting the charge of tax evasion. See 350 U.S. at 360-361. Moreover, in the instant case the grand jurors were aware of the fact that an earlier grand jury that had heard

this testimony firsthand had voted an indictment, and that the government was seeking only an indictment repeating the original charge, shorn of surplus allegations.

b. Petitioner contends (Pet. 10-11) that this Court should grant review to resolve a conflict between this case and *United States* v. *Hodge*, 496 F. 2d 87 (5th Cir. 1974). *Hodge* is a two-page per curiam decision requiring a remand for a factual hearing to develop the defendant's claim that the grand jury had before it only the prosecutor's unsworn summary of the evidence before an earlier grand jury. As the court below noted (Pet. App. 8a n.1), *Hodge* is factually distinguishable because there was no indication that the grand jurors were given any opportunity to inspect the transcripts or have the testimony read to them. But more importantly, *Hodge* is plainly inconsistent with *Costello* and *Calandra*; and indeed, even though *Calandra* was decided several months prior to the court's decision in *Hodge*, it is not mentioned in the court of appeals' opinion. Since the holding of *Costello* was reaffirmed in *Calandra*, and neither the Fifth Circuit nor any other court of appeals has followed *Hodge*, there is no necessity for review at the present time.

Moreover, even if this issue might otherwise merit review, the facts of this case make it an inappropriate vehicle to present this question. The government obtained the superseding indictment solely to avoid prejudice to petitioner. The original three-count indictment was concededly valid. But when the government elected to dismiss the counts charging petitioner with conspiracy and with being an accessory after the fact, it sought some means of eliminating the surplus allegations of conspiracy that had also been included in the remaining count on which the government intended to proceed, allegations that the government thought might be confusing and even inflammatory. The district court clearly had the authority

to strike the surplusage, since that action would not have altered or broadened the offense charged. See *Russell* v. *United States*, 369 U.S. 749, 770 (1962); *Salinger* v. *United States*, 272 U.S. 542, 548-549 (1926); *United States* v. *Lyman*, 592 F. 2d 496, 500 (9th Cir. 1978); *United States* v. *Burnett*, 582 F. 2d 436, 438 (8th Cir. 1976); *United States* v. *Sir Kue Chin*, 534 F. 2d 1032, 1036 (2d Cir. 1976); *Thomas* v. *United States*, 398 F. 2d 531, 536-540 (5th Cir. 1967).

Accordingly, the government originally proposed that the trial court strike the surplusage. This course—which would have been entirely proper—was rejected only because of the unwarranted insistence of petitioner's counsel that the entire second count of the original indictment, encumbered with references to his client's involvement in a conspiracy, be communicated to the trial jury. We cannot see how petitioner would have gained any advantage had this procedure been followed. The surplus allegations contained a complete narrative of the evidence supporting the charges that the government had agreed to dismiss. Since the superseding indictment is identical in all respects to the original indictment with the surplusage deleted, petitioner should not be heard to complain about the superseding indictment that was unnecessarily procured at his counsel's insistence.

2. Petitioner also contends (Pet. 14-16) that the court of appeals erred in holding that the entrapment defense is available only where a government agent induced the commission of the crime in order to obtain evidence for a prosecution, not where the agent acted for his own corrupt purposes. Petitioner's entrapment defense was founded on his allegation that Jacobson, a private polygraph examiner retained to question Weiss, had conducted the first polygraph examination improperly and then demanded a bribe to conduct a second, fair

examination. The court of appeals concluded (Pet. App. 9a-10a) that it need not reach petitioner's claim that the district court's entrapment instruction had been erroneous, because petitioner's allegations that Jacobson demanded a bribe "for his own corrupt purposes and not as evidence for the government" would, if true, establish a claim of extortion but not a claim of entrapment.

Assuming arguendo that Jacobson was acting as a government agent in his dealings with petitioner,[2] the court of appeals correctly ruled that petitioner was not entitled to an entrapment instruction. The entrapment defense bars prosecution when " 'the criminal design originates with officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission *in order that they may prosecute*.' " *United States* v. *Russell*, 411 U.S. 423, 434-435 (1973), quoting *Sherman* v. *United States*, 356 U.S. 369, 372 (1958) (emphasis added). Where, as here, the defendant claims that he acted in concert with a corrupt government agent who intended to engage in a criminal enterprise, not enforce the law by inducing the defendant to incriminate himself, the entrapment defense is inapposite. *United States* v. *Graves*, 556 F. 2d 1319, 1324-1326 (5th Cir.), cert. denied, 435

[2]In actuality, the record lends little support to the assumption that Jacobson was a government agent. The United States Attorney recommended that Jacobson act as the polygraph examiner because of his ability to speak Yiddish, and Veiss concurred (Pet. App. 3a). The parties agreed that Jacobson would serve as an independent examiner on behalf of both parties. The fact that the United States ultimately paid for the polygraph testing does not show that Jacobson was acting throughout as a government agent; indeed, it appears that there was no prior discussion as to who would pay Jacobson (Tr. 7, 15-17, 350-351). See *United States* v. *McClain*, 531 F. 2d 431, 437-438 (9th Cir.), cert. denied, 429 U.S. 835 (1976).

U.S. 923 (1977); *United States* v. *Koss*, 506 F. 2d 1103, 1112 (2d Cir. 1974), cert. denied, 421 U.S. 911 (1975). Accordingly, the trial judge would have been justified in disposing of the issue as a matter of law. See *Sherman* v. *United States*, *supra*, 356 U.S. at 377; *United States* v. *Wolffs*, 594 F. 2d 77, 80 (5th Cir. 1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOSEPH S. DAVIES
CHRISTIAN F. VISSERS
Attorneys

JULY 1979

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